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In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 104

MORRIS A. KENT, JR., PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the court of appeals is reported at 343 F. 2d 247. The order denying rehearing en banc, with a dissenting opinion, is reported at 343 F. 2d 264. The opinion in the companion cases, *Kent* v. *Reid* and *Kent* v. *District of Columbia,* is reported at 316 F. 2d 331.

JURISDICTION

The judgment of the court of appeals was entered on October 26, 1964. The Chief Justice extended the time to file a petition for a writ of certiorari to and including December 24, 1964. The petition was filed on December 23, 1964, and was granted on May 3,

1965 (381 U.S. 902). The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the juvenile court's waiver of jurisdiction was in keeping with statutory and constitutional requirements.

2. Whether it was plain error for the trial court to permit witnesses to refer to a set of petitioner's fingerprints, taken at the time of his apprehension on the present charges, after petitioner's counsel stipulated that these prints could be used for comparison.

3. Whether petitioner was entitled to a directed verdict on the issue of insanity.

4. Whether the judge's charge, approved by petitioner's counsel, was coercive.

STATUTES INVOLVED

11 D.C. Code 914 [now 11 D.C. Code 1553 (Supp. IV, 1965)] provided:

> **Waiver of jurisdiction in case of felony—Transfer of case**
>
> If a child sixteen years of age or older is charged with an offense which would amount to a felony in the case of an adult, or any child charged with an offense which if committed by an adult is punishable by death or life imprisonment, the judge may, after full investigation, waive jurisdiction and order such child held for trial under the regular procedure of the court which would have jurisdiction of such offense if committed by an adult; or such other court may exercise the powers conferred upon the juvenile court in this subchapter in conducting and disposing of such cases.

11 D.C. Code 929 [now 11 D.C. Code 1586 (Supp. IV, 1965)] provided in pertinent part:

Records—Inspection limited—Penalties

(a) The court shall maintain records of all cases brought before the court. Such records shall be withheld from indiscriminate public inspection but shall be open to inspection only by respondents, their parents or guardians and their duly authorized attorneys, and by any institution or agency to which a child may have been committeed pursuant to Section 11–915. Such records may, pursuant to rule of court or special order of the court, be inspected by other interested persons, institutions and agencies. As used in this subsection, the word "records" includes notices filed with the court by arresting officers pursuant to Section 11–912, the court docket and entries therein, the petitions, complaints, informations, motions and other papers filed in any case, transcripts of testimony taken in any case tried by the court and findings, verdicts, judgments, orders and decrees, and other writings filed in proceedings before the court, other than social records.

(b) The records made by officers of the court pursuant to Sections 11–908 and 11–924, referred to in this section as social records, shall be withheld from indiscriminate public inspection, except that such records or parts thereof shall be made available by rule of court or special order of court to such persons, governmental and private agencies, and institutions as have a legitimate interest in the protection, welfare, treatment, and rehabilitation of the child, and to any court before which any such child may

appear. The judge may also provide by rule or special order that any such person or agency may make or receive copies of such records or parts thereof. No person, agency, or institution which has received records or information under this section may publish or use them for any purpose other than that for which they were received.

STATEMENT

Petitioner was tried in the United States District Court for the District of Columbia on three counts each of housebreaking and robbery and two counts of rape (J.A. 1–2).[1] On March 27, 1963, the jury found him guilty on the housebreaking and robbery counts and not guilty by reason of insanity on the rape counts. As a result of the verdict on the rape counts, petitioner was committed to St. Elizabeths Hospital for treatment under 24 D.C. Code 301(d). He was given five- to fifteen-year consecutive sentences on each of the other counts, with credit to be given for all time spent in St. Elizabeths (J.A. 29).[2] The court of appeals affirmed (J.A. 35–64).

[1] "J.A." refers to the Joint Appendix filed in this Court. "Tr." refers to a bound transcript of most of the preliminary and trial proceedings. The other certified transcripts on file, containing the same material but differently paginated, will not be cited. Other papers, not found in the appendix or transcript, will be cited by their description and an appropriate identifying date.

[2] At the time of sentencing on the housebreaking and robbery counts, petitioner's counsel stated that the doctors at St. Elizabeths, where petitioner was then undergoing treatment, thought that petitioner might have to stay there "perhaps for the rest of his life" (Tr. 826–827). Petitioner's counsel then suggested that the court have the housebreaking and robbery sentences

A. *The Juvenile Court Waiver.* Petitioner, now 21 years old (see J.A. 21) and no longer subject to Juvenile Court jurisdiction (11 D.C. Code 1551(b) (Supp. IV, 1965)), first came under the authority of that court at age 14, as a result of several housebreakings and an attempted robbery. After an exhaustive investigation, including interviews with his mother, aunt and school authorities, petitioner, who was represented by counsel, was placed on probation (Tr. 622–627).

On September 5, 1961, petitioner, then 16 years old and still on probation, was taken into custody after fingerprints found at the scene of a recent housebreaking, robbery and rape matched a set of his prints on file with the police (Tr. 8–10, 178–179, 191–194). The next day petitioner's counsel and his mother met with the Juvenile Court's Social Service Director to urge against waiver of jurisdiction under 11 D.C. Code 914 (pp. 2–3, *supra*). The Director informed counsel that he could attempt to speak with the judge on the matter[8] and that action on waiver would be postponed to enable counsel to submit papers to the court (affidavit of Richard Arens, filed November 16, 1961, p. 1). Accordingly, counsel sent the court a motion

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run concurrently with the commitment on the rape counts and "give him a criminal sentence so that there will be some hope, maybe in 30 years, maybe in 40 years, that when he is free in the eyes of the hospital * * * he will not face the rest of his life in a federal penitentiary * * * (Tr. 827).

[8] In his brief (p. 13) it is alleged that "petitioner's counsel was never afforded * * * any audience by the judge of the Juvenile Court * * * ." The court below stated, however, that "[c]ounsel apparently did not press the matter of a personal interview" (J.A. 37).

requesting that petitioner be hospitalized, that counsel be given access to petitioner's Social Service file, and that a hearing be held prior to a determination as to waiver (Arens affidavit, pp. 5–6). Counsel also submitted a memorandum accompanied by a letter from one of the psychiatrists he had retained to examine petitioner in the Receiving Home for Children;[4] this psychiatrist certified that petitioner was suffering from severe psychopathology (affidavit of Dr. Leon Salzman, filed November 16, 1961). Petitioner and his mother[5] were also questioned by Juvenile Court personnel. The record also relates that a report to the judge, dated September 8, 1961, was submitted by the Juvenile Probation Section. "Part of a summary" of that report suggested "a rapid deterioration of [petitioner's] personality structure and the possibility of mental illness" (Tr. 627–628).

[4] At the instance of petitioner's counsel, two psychiatrists and one psychologist examined petitioner at the Receiving Home (Arens affidavit, pp. 2–3).

[5] Petitioner's mother (affidavit of Mrs. Kent, filed November 16, 1961) and his counsel (Arens affidavit, *supra*) stated, in support of his motion to dismiss in the district court (see pp. 7–8, *infra*), that Mrs. Kent had only been interviewed "superficially" in 1959 and for only "a few minutes" in the present proceedings. At trial, a summary of the original "superficial" interview was introduced, indicating that petitioner's aunt supplied information about the boy's adjustment "which the mother was either unwilling or too uncomfortable to give." The mother testified that she found it hard to understand her son's behavior as his economic needs had been amply met, and she expressed the belief that petitioner had been influenced by a playmate to commit the charged offenses (Tr. 623; see opinion of the court of appeals, J.A. 48, n. 11).

On September 12, 1961, the Juvenile Court announced that it had decided "after full investigation" to waive jurisdiction over petitioner as to fourteen specified offenses and any other offenses related thereto, including those involved here (J.A. 21–22).[6] Accordingly, the case was transferred to the district court and the present indictment was found by the grand jury. After unsuccessfully attacking the waiver on habeas corpus and direct appeal,[7] petitioner moved the district court to convene itself as a Juvenile Court under 11 D.C. Code 914 and to dismiss his indictment

[6] Petitioner and the *amici* make a number of unproved allegations as to petitioner's treatment by the police prior to waiver (Pet. Br. 9–11, 31; Amicus Br. 6–7). These are irrelevant to the issues presented here. When the government sought to show at trial where petitioner was taken after his arrest, defense counsel objected that the matter was not relevant, and the government withdrew the question (Tr. 179). In the hearing on the pre-trial motion to suppress evidence, however, the government related the chronology of events after petitioner's arrest. This showed that petitioner was more than once warned of his rights; that he initiated the conversation with the officers; that he talked freely of a number of his offenses and indicated where he had left certain wallets and identification papers, which were later obtained pursuant to warrants (Tr. 10–13). Defense counsel accepted the government's chronology "as being substantially accurate" (Tr. 15) and "not color[ed]" (Tr. 7). The position as to the facts taken before the district court is thus inconsistent with that expressed in petitioner's brief (pp. 9–11). In any event, all evidence obtained as a result of questioning petitioner prior to waiver was excluded from his trial under the rule of *Harling* v. *United States*, 295 F. 2d 161 (C.A.D.C.) (Tr. 16). See opinion of the court of appeals, J.A. 54–55, n. 17.

[7] Relief was denied in both actions on the ground that the proper means of reviewing the Juvenile Court's waiver is a motion to dismiss in the district court. *Kent* v. *Reid*, 316 F. 2d 331.

on the ground that the Juvenile Court's waiver was improper. At the hearing on the motion to dismiss, the court gave petitioner's social records to counsel for examination.

The district court denied both motions. It found that the Juvenile Court had complied with the statutory provision for a full investigation prior to waiver, noting that the statute did not require a judicial or quasi-judicial hearing (Tr. 19) and that none of the testimony proffered by petitioner's counsel to the Juvenile Court was relevant to the waiver investigation (Tr. 17–18).

On review of the conviction, the court of appeals held that the waiver in this case was in keeping with the statute and the *parens patriae* philosophy of the Juvenile Court. It held that the criteria for waiver formulated by the Juvenile Court (J.A. 41–43, n. 5; Appendix A, *infra*)[8] were not arbitrary or capricious. Noting that many of the relevant factors were subjective, it stated that "the essence of the juvenile court system is subjective judgment—the skill and experience of the specialist judge brought to bear upon young people in trouble. The revision of that trained judgment in a particular case by a non-specialist tribunal is a venture not to be undertaken lightly and without patent justification" (J.A. 43). The court observed that the juvenile judge was apprised of petitioner's mental problems and that the Juvenile Court's facilities for treating such

[8] The policy memorandum setting forth the criteria for waiver applied in this case is no longer in effect. See *United States* v. *Caviness*, 239 F. Supp. 545, 550 (D.D.C.).

cases were probably inadequate. It suggested that there was a greater opportunity for proper disposition of the mental aspects of the case in the district court, "especially considering the limited time available for cure and rehabilitation under a Juvenile Court commitment" (J.A. 45). The court found that, particularly in light of petitioner's having been under Juvenile Court authority for over two years prior to waiver, the "full investigation" requirement was complied with (J.A. 47). It also found that the Juvenile Court did not abuse its discretion in refusing to allow petitioner's counsel to see his social records (J.A. 51–54).

Judge Washington, concurring separately, emphasized the responsibility of the district court and court of appeals to afford careful review to a waiver determination and stated that waiver should be the exception, not the rule. He agreed, however, that in this case "the showing made was not such as to justify us in setting aside the waiver" (J.A. 61). Chief Judge Bazelon and Judge Wright, dissenting from the denial of rehearing *en banc,* urged that the court of appeals itself should have reviewed petitioner's social records and that intelligent review of the waiver could not be made "unless the reasons for it are stated *on the record*" (343 F. 2d at 265).

B. *The District Court Proceedings.* Prior to trial, petitioner was committed first to D.C. General Hospital, although the government urged that St. Elizabeths would be more appropriate (Hearing of Oct. 13, 1961), and later, without objection, to St. Elizabeths (Tr. 5–7, hearing of Jan. 8, 1962) for psychiatric ex-

amination. The doctors at D.C. General found petitioner incompetent to stand trial. They were uncertain whether he was psychotic at the time of the alleged offenses, but stated the opinion that he was a "dangerous boy" and that "long term treatment should be offered him" (Letter filed December 22, 1961). The doctors at St. Elizabeths found that petitioner was competent to stand trial, but that he was psychotic at the time of the alleged offenses and that the offenses, if committed, were the products of his disease (Letter filed April 6, 1962). On the basis of the professional testimony at a competency hearing held on March 7, 1963, the court found petitioner competent to stand trial (Hearing of March 7, 1963, before Hart, J., transcript filed October 2, 1963).[9]

At the trial, the three victims of the offenses charged in the indictment testified for the prosecution. Juanita Echols testified that she awoke about 1:00 a.m. on June 5, 1961, and saw the outline of a head above her television set. When she asked who was there, a man grabbed her by the shoulders and said, "Don't make a noise * * * all I came for is your money" (Tr. 32–34). She told him where her billfold was and he put it in his pocket (Tr. 34–35). In her distress, she dropped the pillow she had been holding in

[9] A pre-trial motion to suppress evidence was heard before the trial judge (Tamm, J.) (Tr. 3–16), who ruled that the confessions, as well as victims' wallets and identification cards which were found as a result of the confessions, were to be suppressed (Tr. 16). See note 6, *supra*.

front of her, revealing that she was unclothed above the waist. Thereupon the intruder beat her around the face, threatened to kill her if she screamed, and raped her (Tr. 37–38). Latent fingerprints found on the window ledge of Miss Echols' apartment were identified as petitioner's (Tr. 77–96).

Gloria Jean Palmer testified that she was awakened early in the morning of June 12, 1961, by a hand being placed over her mouth (Tr. 96–100). When the intruder removed his hand from her mouth, she screamed for her roommate, and the intruder fled down the fire escape (Tr. 100–101). Later, Miss Palmer found that $47.00 and her wallet had been stolen (Tr. 102–103). Petitioner's fingerprints were found on the closet door in Miss Palmer's room (Tr. 115–130).

Mary Murphy testified that she was awakened in the early morning hours of September 2, 1961, to find a man's hand on her neck (Tr. 132–138). He raped her and then fled through the kitchen window of her apartment (Tr. 136, 138–139). Later, she discovered that her wallet and $12.00 were missing (Tr. 144). Miss Murphy testified that a light was on in her room when she was attacked (Tr. 143) and identified petitioner as her assailant (Tr. 148–151). Petitioner's fingerprints were found on a table on the fire escape outside Miss Murphy's apartment (Tr. 190–208).

In the opening statement on behalf of petitioner, his counsel stated, "The defense in this case will not go to the thrusts of the crimes of rape or the crimes of housebreaking. The defense in this case will be an

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insanity defense" (Tr. 24). For convenience, the extensive evidence on this issue is summarized in Appendix B, pp. 4a–7a, *infra*.

Prior to submission of the case to the jury, the court discussed the proposed requests for instructions (Tr. 731–734). The judge did not comment upon the evidence in his charge (Tr. 778), but outlined the charges and the pertinent law, including the defense of insanity (Tr. 779–815). He also charged as follows (Tr. 815–816):

> You have before you all of the evidence which the Government and the defendant can offer in this case. The verdict which you return to the courtroom should represent your individual opinions. In other words, each of you must arrive at your own verdict; but this does not mean that your views, your opinions may not be changed by conference in the jury room. The object of the jury system is to secure a unanimous verdict by comparison of views and by arguments and by discussion among the jurors themselves. Each of you should listen with deference to the arguments of the other jurors and with a distrust of your own judgment if you find that a large majority of the jurors take a different view of the case than that which you yourself take.
>
> None of you should go into the jury room with a blind determination that the verdict should represent your opinion of the case at the moment you leave the courtroom, or that you should close your ears to the arguments of other jurors who are equally honest and equally intelligent with yourself. Accordingly, although the verdict must be the verdict of each of you

individually and not a mere acquiescence in the conclusion of your fellow jurors, the Court instructs you that you should examine the issues submitted with candor and with a proper regard and deference to the opinions of each other. It is your duty to decide this case if you can conscientiously do so. You should listen to each other's arguments with a disposition to be convinced.

If in any question put to you for a vote by your foreman, any one of you should find that you are a very pronounced minority on any question, you should appraise your situation. You should ask yourself, Why did this evidence make such an impression on me when it didn't make a similar impression on a great number of other jurors who are equally honest and equally intelligent with myself?

I repeat, your verdict must be a unanimous one. It must represent your individual view of the case, but you should not solidify your judgment in the case until you have had an opportunity to listen with an open mind to the discussion of all of the other jurors in the jury room.

In conclusion, the judge stated that the jury would not be locked up and thus there would be no pressure to reach an immediate verdict (Tr. 816–817).

The defense did not object to the charge as given but stated (Tr. 819):

I believe that the Court's charge was eminently fair as to all the defendant's requested instructions, and I think the Court's charge in toto realistically and accurately stated the law in the District of Columbia.

The court of appeals ruled that it was not error for the district court to refuse to grant petitioner's motion for acquittal, stating that "[t]he evidence we consider to have been in the precise posture which calls for submission of the issue to the jury" (J.A. 56–58). It also held that the court did not err in allowing the use of petitioner's fingerprints as evidence against him or in instructing the jury (J.A. 59–60).

INTRODUCTION AND SUMMARY OF ARGUMENT

The relatively recent development of specialized courts for the treatment of youthful offenders has engendered a great many problems, both administrative and legal. In particular, the question of the extent to which "traditional constitutional guarantees apply to juvenile court proceedings" (*Amicus* Brief, p. 2) has aroused a great deal of concern.[10] We agree that this broad question is important, but observe at the outset that it is not involved in the present case.

[10] See Ketcham [the judge who transferred jurisdiction in this case], *Unfilled Promise of Juvenile Court*, in *Justice for the Child* 22–43 (Rosenheim ed., 1962); Allen *The Borderland of Criminal Justice*, pp. 16–24, 42–61; Handler, *The Juvenile Court and the Adversary System*, 1965 Wis. L. Rev. 7; Paulsen, *Fairness to the Juvenile Offender*, 41 Minn. L. Rev. 547 (1957); Dembitz, *Ferment and Experiment in New York: Juvenile Cases in the New Family Court*, 48 Cornell L.Q. 499 (1963); Antieau, *Constitutional Rights in Juvenile Courts*, 46 Cornell L.Q. 387 (1961); Shears, *Legal Problems Peculiar to the Juvenile Court*, 28 D.C.B.A.J. 486 (1961); see also, Hearings Before the Subcommittee to Investigate Juvenile Delinquency of the Senate Judiciary Committee, 86th Cong., 1st Sess., pt. 1, pp. 15–29 (Testimony of Prof. Tappan and Dr. Kahn).

Indeed, many of the constitutional problems being debated in other jurisdictions are already settled in the District of Columbia. Thus, an accused juvenile in the District is entitled to a jury trial on the issue of delinquency. 16 D.C. Code 2307 (Supp. IV, 1965); cf. Federal Juvenile Delinquency Act, 18 U.S.C. 5033. It is also settled in this jurisdiction that no statement obtained from a juvenile prior to waiver of jurisdiction is admissible in a subsequent criminal trial (*Harling* v. *United States*, 295 F. 2d 161 (C.A. D.C.)), and that a juvenile has the right to counsel at delinquency hearings (*Shioutakon* v. *District of Columbia*, 236 F. 2d 666 (C.A. D.C.); *McBride* v. *Jacobs*, 247 F. 2d 595 (C.A. D.C.)). The only Juvenile Court question presented here is a narrow one: Was the Juvenile Court's waiver of jurisdiction accomplished in compliance with the statute and without fundamental unfairness to petitioner?

The Juvenile Court Act of 1938 represented an imaginative experiment in the treatment of youthful offenders. In embarking on this venture, Congress necessarily placed great reliance on the specialists entrusted with the successful operation of the court's corrective programs. It sought to promote flexibility in the process by refusing to restrict the court's personnel to the conventional modes of procedure developed in the criminal field.[11] The legislative judg-

[11] The provision for a jury trial upon demand on the question of delinquency (16 D.C. Code 2307 (Supp. IV, 1965)), while not "in accord with the spirit of the [Juvenile Court] law," was inserted only because it was felt that Article III, Section 2 of the Constitution required it. See H. Rep. No. 177, 75th Cong., 1st Sess, p. 4; 81 Cong. Rec. 1004.

ment—traditionally entitled to a high degree of respect—is worthy of particular deference in this young and still experimental area of endeavor.

I

The original Juvenile Court Act of 1906 created, in effect, a specialized police court for children under seventeen. The 1938 revision, however, created a court designed to treat youthful offenders by non-criminal process. The Act contained the "safeguard" under which the court could waive jurisdiction over cases involving serious offenses, and provided that waiver could be accomplished after a "full investigation."

The Due Process Clause does not require an adversary hearing on this question. The constitutional requirement is fundamental fairness in the decision-making process, but the test of fairness is a flexible one, tailored to the nature and consequences of the particular inquiry.

The nature of the decision in this case was not such as to render an adversary presentation constitutionally mandatory. The decision to be made was whether petitioner was charged with a serious offense and evidenced deep-seated problems calling for long-term treatment, beyond the existing resources of the Juvenile Court. The elements in this decision were readily obtainable in reliable form through an administrative investigation, and petitioner has not suggested how the court would have been aided by a live hearing.

Nor were the consequences of the decision so grave as to compel a hearing as a prophylactic measure.

The Juvenile Court's decision was reviewed in the district court, which had authority to sit as a Juvenile Court itself. And in the district court trial petitioner was afforded the full measure of constitutional protections and had access to treatment facilities at least as satisfactory (and probably better than) as those available in the Juvenile Court.

The practice with regard to waiver in the States is varied. Some States which have transfer provisions require hearing prior to transfer. Our examination of the authorities, however, suggests that most States—like the District of Columbia—do not require hearings. The question is typically treated as one for the application of legislative judgment, as is appropriate in this relatively new and developing area.

The waiver decision is, we submit, analogous to a judge's determination of an appropriate sentence, or to the decision whether a defendant who has been sentenced to death has become insane after sentencing, so that the sentence may not be carried out. This court has held that criminal-trial safeguards are not necessary for these inquiries, notwithstanding the drastic consequences of decision in those situations.

There was no fundamental unfairness in denying petitioner's request for an adversary hearing or his counsel's request to see confidential Juvenile Court records. Neither of these procedures was essential to the fairness of the Juvenile Court proceeding. Nor is there merit to the claim that the court was acting without ascertainable standards. The criteria for waiver applied in this case had been announced more than two years before the decision in question.

II

The statutory requirement of "full investigation" was compiled with here. Counsel consulted with the Social Service Director and communicated with the judge. The court had before it ample information on which to base its decision to waive—including data gathered over the years petitioner was on probation. The decision to waive was in full accord with the congressional intent in making provision for waiver, and it was properly sustained by the district court.

Petitioner's counsel had no statutory right to see his social records. The statute plainly contemplates that "official records" may be shown to "attorneys" but makes no similar provision as to the social records. The history of the Act, moreover, plainly shows that those to whom the social records were to be available were agencies treating the child *after* disposition of his case by the Juvenile Court.

III

There was no reversible error in petitioner's trial in the district court.

Petitioner cannot now object to the use of fingerprints which his counsel expressly stipulated could be used for comparison with impressions found at the scenes of the three housebreakings. In any event, the prints were properly admissible. They were not acquired in the performance of any "official duties" of the Juvenile Court under 11 D.C. Code 929(c) (now 11 D.C. Code 1586(c)). Nor were they the product of an illegal arrest or unduly delayed detention. Indeed,

the record fails to support any allegation of illegal arrest or unduly delayed detention.

The evidence as to petitioner's mental condition was in dispute, and was, therefore, precisely in a posture to go to the jury. There was expert testimony fully supporting the jury's verdict.

The court's instruction in this case was not coercive. The court made absolutely clear that each juror was to decide on the basis of his individual judgment.

ARGUMENT

I

THE JUVENILE COURT FOLLOWED CONSTITUTIONAL PROCEDURES IN DETERMINING WHETHER TO "WAIVE" JURISDICTION OVER PETITIONER

Petitioner's initial challenge to the validity of his conviction turns upon the constitutionality of the procedure followed by the Juvenile Court in determining whether to waive jurisdiction over him. Petitioner contends in this regard that he was entitled (1) to examine and rebut the evidence relied on by the Juvenile Court (Pet. Br. 32–34, 41–42); (2) to present "his case against waiver" in an adversary hearing (Pet. Br. 34–36); and (3) to be represented by counsel in the Juvenile Court (Pet. Br. 36–37). All of these procedural claims rest on the premise that the safeguards which are constitutionally guaranteed to an accused at all critical stages of a criminal prosecution apply in full measure to the proceeding involved in this case. We submit that the decision of the Juvenile Court for the District of Columbia whether or not to "waive" its jurisdiction over a par-

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ticular juvenile offender is not, in light of the history of that body and its contemporary functions, the type of determination which requires all the safeguards of a criminal trial. The procedure customarily followed by the Juvenile Court (which was followed here) is calculated to produce an informed and intelligent decision on the questions underlying the issue of waiver with a minimum of formality and delay. In view of the limited purpose and consequences of the waiver inquiry, that procedure satisfies constitutional standards of fairness.

Waiver of jurisdiction by the Juvenile Court does not, *ipso facto,* result in the deprivation of life, liberty or property. Nor is it, in any ordinary sense, a transfer of judicial power from one tribunal to another. The history of the Juvenile Court for the District of Columbia (which we recount at pp. 22–25, *infra*) demonstrates that, as Judge McGowan noted below (J.A. 52, 343 F. 2d at 258), the Juvenile Court "administers a non-criminal process in the nature of social service work directed to the accommodation of the interests of the juvenile and of society." By vesting "original and exclusive jurisdiction" over certain offenders in the Juvenile Court (11 D.C. Code 1551), Congress expressed a legislative judgment that those as to whom the Juvenile Court may *not* waive jurisdiction—*i.e.,* accused juvenile misdemeanants and persons under 16 who are charged with a felony not punishable by death or life imprisonment—should invariably be treated within this system of "social service work" rather than by the ordinary processes of the criminal law. But with respect to "waivable"

juveniles such as petitioner—*i.e.*, those who are accused of a felony punishable by death or life imprisonment and any accused felon over the age of 16—Congress has merely assigned to the Juvenile Court the task of determining, in the first instance, whether a social-service or criminal remedy is more appropriate in the particular case. That decision is similar in kind to decisions which have not traditionally been thought to require adversary proceedings, and it usually depends upon the resolution of issues which are not suitable for full-scale evidentiary hearings.

We agree, of course, that Juvenile Court proceedings, like all governmental action, must satisfy fundamental standards of fairness. See, *e.g.*, *Pee* v. *United States*, 274 F. 2d 556, 559 (C.A. D.C.). We submit, however, that what constitutes fair procedure within the meaning of the Fifth Amendment's Due Process Clause depends on the nature and consequences of the particular governmental inquiry at issue. Where, as here, Congress has authorized extrajudicial treatment of certain kinds of criminal offenders, the decision whether an individual accused can effectively be treated by such special techniques need not be made pursuant to the same procedures as the Constitution affords for the determination of guilt or innocence on criminal charges. The inquiries differ in kind, and these differences justify procedural distinctions. As this Court noted in *Federal Communications Commission* v. *WJR, Inc.*, 337 U.S. 265, 275–276, to construe the due process guarantee of the Fifth Amendment as "a term of fixed and invariable content" would "do

violence * * * to the constitutional power of Congress to devise differing administrative and legal procedures appropriate for the disposition of issues affecting interests widely varying in kind." That principle applies here.

A. THE HISTORY OF THE STATUTE SHOWS THAT THE NATURE OF THE WAIVER INQUIRY DOES NOT WARRANT THE PROCEDURAL SAFEGUARDS REQUIRED FOR CRIMINAL TRIALS

The Juvenile Court Act of March 19, 1906 (34 Stat. 73), vested in the Juvenile Court for the District of Columbia original and exclusive jurisdiction over offenses committed by persons under 17 years of age, which were "not capital or otherwise infamous" and, with certain exceptions, not punishable by imprisonment in the penitentiary.[12] For more than thirty years, the court had "jurisdiction of petty offense and misdemeanors only * * * [and was required to] hold children who have committed greater offense for the action of the grand jury." S. Rep. No. 530, 75th Cong., 1st Sess., p. 2. The early court, whose hearings and records were open to the public (*ibid.*), was little more than a specialized police court for persons under seventeen.

In 1938, Congress completely revised the Juvenile Court Act, incorporating therein the main features of the National Probation Association's Standard

[12] The 1906 Act was patterned after various State juvenile court acts. The jurisdiction it conferred was a composite of that granted in 1885 to the Washington Humane Society, in 1892 to the Board of Children's Guardians, and in 1901, to the District's police courts. See H. Rep. No. 2169, 59th Cong., 1st Sess., pp. 10–13.

Juvenile Court Act. 52 Stat. 596. The new statute, designed chiefly "to change the court from a criminal to a chancery court" (H. Rep. No. 177, 75th Cong., 1st Sess., p. 2), gave the court original and exclusive jurisdiction over children under 18 years of age accused of violating any law and provided that delinquency proceedings and court records would be closed to the general public. In addition, the act contained what was described as a "safeguard," giving the court discretion to refer cases involving serious offenses to the district court (*id.*, pp. 2–3).

As originally enacted, the "waiver" provision (§ 13, 52 Stat. 599) applied only in the case of "a child sixteen years of age or older [who] is charged with an offense which would amount to a felony in the case of an adult * * *." In 1947, as a result of the public clamor arising out of the murder of a policeman by a 14-year-old boy, whom the Juvenile Court could neither transfer to district court nor hold beyond age 21 (93 Cong. Rec. 3354, 4566), Congress added the clause authorizing waiver of "any child charged with an offense which if committed by an adult is punishable by death or life imprisonment." In either situation, the decision whether to retain jurisdiction was to be made "after full investigation."

Congress explained the 1947 amendment as follows (H. Rep. No. 242, 80th Cong., 1st Sess., p. 2):

> * * * Despite the fact that public interest and safety may demand that these offenders be detained and treated for extended periods, the jurisdiction of the court terminates when the child reaches his majority and he is returned to

> society, even though his return may, in fact, constitute a hazard to the community or handicap law enforcement * * *.
>
> The amendment permits the juvenile court to waive jurisdiction in the case of any child who commits an offense punishable by death or life imprisonment. These offenses include kidnapping, murder, and rape.
>
> It is recognized that the number of children who are charged with the serious offenses enumerated will undoubtedly be very small. It is also recognized that some of the children who become involved in such difficulties will respond to treatment in the care and under the supervision of agencies available to the juvenile court. It is equally true, however, that certain of these offenders who present deep-seated problems must be provided with long-term institutional care, and must not be returned to the community while there is any danger of their repeating their offenses. The proposed amendment permits the juvenile court *to determine which children will be amenable to the treatment resources at its disposal* and to transfer its jurisdiction in cases demanding such action. [Emphasis added.]

The purpose of the waiver inquiry, as disclosed by the above legislative history, is to determine whether an accused juvenile has evidenced "deep-seated problems" calling for "long-term institutional care" which may not "be amenable to the treatment resources" which the Juvenile Court has at its disposal.[13] The

[13] The court of appeals has read the statute in the same manner: "The original-and-exclusive-jurisdiction clause, coupled with the waiver clause, is merely a procedural device for putting

elements entering into a decision on this question—the accused's age, the seriousness of the alleged crime, his prior criminal record, his history of mental illness, the treatment facilities available to the court, and the adequacy of short-term treatment (*i.e.*, until the accused reaches his twenty-first birthday [14])—may be fully canvassed in a careful administrative investigation such as was conducted in this case. Petitioner does not suggest that any issues of credibility were involved here which would have warranted cross-examination or other adversary procedures. There may, of course, be instances in which the critical question on which waiver depends could be clarified by an evidentiary hearing. *Cf. United States* v. *Dickerson*, 271 F. 2d 487 (C.A.D.C.). Whether a hearing would be required in those circumstances is a question which need not be reached in this case; it has not been suggested that any such issue exists here.

B. THE CONSEQUENCES OF THE WAIVER DECISION ARE NOT SO DRASTIC AS TO REQUIRE THAT IT BE MADE ONLY PURSUANT TO PROCEDURES APPROPRIATE IN CRIMINAL TRIALS

The nature of the waiver inquiry does not lend itself, as we have shown, to adversary procedures of the sort followed in criminal trials. Equally significant, we believe, is the fact that a waiver of Juvenile Court

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child offenders within the remedial treatment of the Juvenile Court if it appears after investigation that such disposition is in the interest of the public and of the child." *Briggs* v. *United States*, 226 F. 2d 350, 351 (C.A.D.C.).

[14] Under 11 D.C. Code 1551 the Juvenile Court may not retain a person in its custody beyond his twenty-first birthday. Hence any treatment prescribed by that court must automatically terminate when the accused turns twenty-one.

jurisdiction does not result directly in any deprivation of life, liberty or property. It releases an accused to the ordinary processes of the criminal law with all its constitutional protections. Its effect is merely (1) to make the proceedings against him public, (2) to render corrective treatment beyond the age of 21 possible, and (3) to authorize the imposition of adult penalties such as imprisonment in a federal penitentiary. The waiver deprives the accused of nothing other than the statutory presumption that society is better served if youthful offenders are treated by a social service agency rather than by judicial criminal process. The district court which assumes jurisdiction over the offender may, if it chooses, exercise its own discretion to sit as a Juvenile Court, thereby again making the proceedings private and limiting the available corrective treatment to that which a Juvenile Court may impose. *United States* v. *Anonymous,* 176 F. Supp. 325 (D.D.C.).[15] If the district court decides not to sit as a juvenile tribunal, as was the case here, the accused is afforded the full panoply of constitutional safeguards. In addition, he is guaranteed that no statement given by him prior to waiver will be used at his trial. *Harling* v. *United States,* 295 F. 2d 161 (C.A. D.C.). If, as here, there is a question as to mental capacity, that issue may be considered in the district court at least as fully as

[15] The district court first reviews the Juvenile Court's waiver to determine whether the "full investigation" prescribed by statute was conducted and whether the Juvenile Court's result was supported by the material before it.

it can be with the more limited resources of the Juvenile Court. And if the accused is found incompetent to stand trial, adequate facilities for treatment are available to him. Finally, if he is found guilty of an offense, the juvenile may be given corrective treatment similar, in all material respects, to that provided by the Juvenile Court. See the rehabilitative provisions of the Federal Youth Corrections Act (18 U.S.C. 5005–5026).

The waiver inquiry involved here is, we submit, not materially different from the question which would have to be resolved by a prosecutor in any jurisdiction not having a Juvenile Court. If a juvenile were believed to have committed a felony in any such jurisdiction, the prosecutor would appropriately consider the desirability and availability of corrective treatment other than formal criminal process in determining whether or not to institute criminal charges. He would be compelled to weigh considerations such as the age and record of the accused, the gravity of the offense of which he is suspected, the availability of alternative treatment, the probability that such treatment would be effective and any other peculiarities of the case bearing upon the decision whether or not to prosecute. This decision has never been thought to be the kind requiring all the safeguards of a criminal trial. That is partly because the decision does not, in and of itself, deprive the accused of anything; it merely determines whether he should be given the benefit of certain special therapeutic processes which are believed to be generally

more effective with youthful offenders than ordinary criminal sanctions.

The Juvenile Court Act does, of course, give a youthful offender a statutory right to be treated differently from an adult accused, and he may be deprived of this right only if the Juvenile Court lawfully waives its jurisdiction. We agree that the Juvenile Court may not waive arbitrarily and must afford fair procedures in administering this right. But in determining whether the Constitution compels the Juvenile Court to afford criminal-trial safeguards in executing this function, it is material to consider that the effect of the waiver is no different from a prosecutor's decision to impanel a grand jury and seek an indictment. Indeed petitioner contends that the Juvenile Court's decision amounts to a finding of "probable cause" (Pet. Br. 29). It is instructive to note, in this regard, that the finding of probable cause which supports an indictment or a search warrant may occasionally be made *ex parte* by a grand jury or a commissioner, and that no adversary hearing or right to examine all the evidence is afforded.

C. A SURVEY OF THE STATE PRACTICES DISCLOSES NO CONSENSUS REGARDING THE NEED FOR ADVERSARY HEARINGS PRIOR TO WAIVERS OF JUVENILE COURT JURISDICTION

Since there is no constitutional prohibition against the trial of juvenile offenders in the regular criminal courts (see *Haley* v. *Ohio,* 332 U.S. 596, 603 (concurring opinion)), the scope of Juvenile Court jurisdiction and the criteria for waiver in each State are based upon the statutes of that particular State.

Thus, in considering the question whether the waiver decision in the District of Columbia is of such a nature or carries such consequences as to warrant the imposition of a hearing requirement, we have necessarily confined ourselves to a discussion of the District of Columbia Juvenile Court Act. The practices in other jurisdictions, however, are not without relevance. See *Leland* v. *Oregon*, 343 U.S. 790, 798.

The statutory provisions in this field vary greatly from State to State.[16] In some States, where the juvenile courts are confined to treating very young persons or are precluded from dealing with serious crimes, there is generally no provision for transfer of jurisdiction and, consequently, no hearing requirement. See Iowa Code Ann. § 231.1; Annot., 48 A.L.R. 2d 663; cf. N.Y. Family Court Act § 715. Some form of transfer provision exists in approximately thirty States, but the criteria are so varied as to make a meaningful comparison impossible. While some State statutes expressly require a hearing in addition to a "full investigation" prior to waiver,[17] our examination indicates that most of the State statutes with transfer provisions do not call

[16] See Hearings Before the House Committee on the District of Columbia on H.R. 6747, To Amend the Juvenile Court Act of the District of Columbia, 87th Cong., 1st Sess., p. 63 (table); National Council of Juvenile Court Judges, *Directory and Manual* 306–337 (chart).

[17] See, *e.g.*, Alaska Stat., Welfare and Institutions, § 47.10.06; Del. Code Ann. 11 § 2711; Idaho Code Ann. § 16–1806; Mass. Gen. Laws Ann. c. 119 § 61; Minn. Stat. Ann. § 260.125(c); Mo. Rev. Stat. § 211.071; Tenn. Code Ann. § 37–264; Utah Code Ann. § 55–10–86; Va. Code Ann. 16.1–176; cf. N.H. Rev. Stat. Ann. 169:21 ("before hearings").

for a hearing. The Supreme Court of New Jersey, considering the objective nature of the waiver criteria in that State, has held that a limited hearing prior to waiver is required. *State* v. *Van Buren*, 29 N.J. 548.[18] The courts in other States, however, have refused to impose a hearing requirement where none is provided by statute. See, *e.g.*, Re *Castro and Others*, 44 Hawaii 455, 462; *Hall* v. *Commonwealth*, 231 Ky. 473, 475.[19] In short, there is no national consensus other than the generally accepted view that the practice in this area depends on the judgment of the legislatures—which, in turn, have been guided by the experience gained by Juvenile Court specialists as the youth correction system matures.

D. OTHER DETERMINATIONS IN THE COURSE OF THE CRIMINAL PROCESS WHICH HAVE MORE DRASTIC CONSEQUENCES THAN THE WAIVER DECISION MAY CONSTITUTIONALLY BE MADE WITHOUT THE PROCEDURES REQUIRED FOR DETERMINING GUILT OR INNOCENCE

We have discussed at pp. 27–28, *supra*, our view that the matter of waiver is analogous, in many respects, to a prosecutor's decision whether or not the circumstances of the alleged crime and the character of the offender warrant the institution of formal criminal proceedings. In addition, we submit that the nature of the waiver inquiry is substantially similar to the inquiry which a court must conduct in arriving at an appropriate criminal sentence. In both instances,

[18] See also *State* v. *Tuddles*, 38 N.J. 565; cf. *Goodlet* v. *Goodman*, 34 N.J. 358, certiorari denied, 368 U.S. 855.

[19] Contrary to petitioner's assertion (Pet. Br. 36, n. 22), there is nothing in *Childers* v. *Commonwealth*, 239 S.W. 2d 255 (Ky.), to indicate that the court "viewed a hearing [as] necessary for a valid transfer of jurisdiction * * *."

among the major relevant considerations are the nature of the offense, the circumstances of its commission, the need for protecting the community against the offender, the emotional and mental condition of the accused, and the accused's prior record (compare Appendix A, pp. 1a–3a, *infra*, with *Policies and Standards for Sentencing*, 27 F.R.D. 389). The sentencing decision has, of course, an immediate and direct impact—it fixes the duration of a term of imprisonment or directs whatever other corrective treatment the judge believes to be appropriate, extending even to the imposition of capital punishment. Notwithstanding the more drastic consequence of the sentencing inquiry, this Court has held that a criminal defendant has been afforded due process of law even if his sentencing judge relies upon out-of-court information unknown to the defendant in arriving at his sentence. *Williams* v. *New York*, 337 U.S. 241. And while Rule 32, Fed. R. Crim. P., entitles a criminal defendant "to make a statement in his own behalf and to present any information in mitigation of punishment" (see *Green* v. *United States*, 365 U.S. 301), we have found no decision holding that a defendant is entitled to a pre-sentence adversary hearing. *Cf. Williams* v. *Oklahoma*, 358 U.S. 576, 582–583.

A further analogy can be drawn, we believe, to this Court's decision in *Solesbee* v. *Balkcom*, 339 U.S. 9, which held that the informal procedures followed by the Governor of Georgia in determining whether a convicted defendant sentenced to death was insane (so that he could not, under Georgia law, be executed) was "not a denial of due process of law" (339 U.S. at

14) notwithstanding the failure to provide for an adversary hearing or for a judicial finding. The dissent in *Solesbee* (on which additional dissenting views were based in *Caritativo* v. *California*, 357 U.S. 549) rested on the premise that it was unconstitutional for a State to execute a person who had become insane after sentencing. The present case involves no similar underlying constitutional issue. There is no constitutional bar against subjecting juvenile offenders to ordinary criminal process. See *Haley* v. *Ohio*, 332 U.S. 596, 603 (concurring opinion). Hence the issue here is whether procedures short of those followed in criminal trials may be used in determining whether an accused is entitled to a *statutory*, rather than *constitutional*, right. We submit that if the determination involved in *Solesbee*—which resulted directly in a deprivation of life—could constitutionally be reached after informal procedures lacking any adversary hearing, the far less drastic decision made here by the Juvenile Court cannot be declared constitutionally invalid because it lacked that safeguard of a criminal trial. See also *Burns* v. *United States*, 287 U.S. 216, 219–223.

E. FAIR PROCEDURES WERE FOLLOWED IN THIS CASE

We turn now to petitioner's particular complaints regarding the procedures followed by the Juvenile Court. When measured against the applicable standard of fairness, rather than by what is required in criminal trials, the course followed by the Juvenile Court, we believe, falls well within constitutional bounds.

(1) *"Secret" evidence.*—Petitioner's claim is essentially that his counsel was improperly denied access to the Social Service file[20] prior to the Juvenile Court's waiver. But the Juvenile Court was entitled to rely on such matter just as a district court may rely on out-of-court information unknown to a defendant in fixing a sentence. See *Williams* v. *New York,* 337 U.S. 241, and pp. 30–32, *supra.* The records involved here were simply the product of the "full investigation" into petitioner's amenability to treatment within the facilities available to the court. They were court records protected by statute against disclosure (see pp. 39–41, *infra*), and petitioner's counsel had no statutory or constitutional right to see them. Moreover, petitioner was shown the social records by the district court, and he then had an opportunity to make whatever contentions were available to him from these records as a basis for attacking the validity of the waiver and urging the district court to constitute itself a Juvenile Court. He did not then, nor does he now, claim that any information therein took him by surprise or that statements found in the records were untrue.

(2) *Hearing.*—Petitioner was permitted to submit documents to the Juvenile Court and was advised that he could attempt to speak with the judge (pp. 5–6, *supra*). He did not, as the court below noted, "press the matter of a personal interview" (J.A. 37), but he did request a hearing, which was denied. Petitioner

[20] The records in question consist of "background psychological, sociological and economic data to inform the juvenile authorities on treatment of the child." Court of appeals' opinion, J.A. 53.

contends that at such a hearing he could have "adduced evidence to show that he was properly susceptible to rehabilitation under Juvenile Court auspices" (Pet. Br. 34), but no explanation is afforded as to why this evidence could not have been adduced by documentary proof. Petitioner did submit a memorandum and a letter from a psychiatrist, and any additional evidence along this line would doubtless have been accepted and considered. A full-scale evidentiary hearing would have been meaningful only if there were some factual issue on which live examination and cross-examination would have been helpful. Petitioner never made any such claim and makes none now. In light of the issues on which the waiver decision turned (pp. 25–28, *supra*), it is most unlikely that any live hearing would have been of assistance to the Juvenile Court. Since no full-scale hearing is required by statute (pp. 35–36, *infra*), the court acted within its discretion in deciding the question of waiver on the basis of the documents before it.

(3) *Assistance of Counsel.*—Petitioner retained counsel almost immediately upon arrest, and counsel met with staff members of the Juvenile Court on the day after arrest (p. 5, *supra*). Petitioner's claim in this regard must therefore refer to the fact that counsel was not permitted to examine petitioner's social records or to appear at a live hearing in the Juvenile Court. For the reasons stated above (pp. 19–33, *supra*), we do not believe that these circumstances violated petitioner's constitutional right to due process of law.

(4) *Reasonable and Ascertainable Standards.*—*Amici* contend that the constitutional flaw in this proceeding was that the Juvenile Court's waiver was not made pursuant to ascertainable criteria which were subject to judicial review (*Amicus* brief, pp. 8–11). In fact, however, the criteria used in this case had been published by the Juvenile Court nearly two years earlier. See Appendix A, pp. 1a–3a, *infra.* It was then clear by what standards the waiver decision would be made. The fact that the criteria were not included in the statute does not invalidate the statutory scheme. For in an area such as this one, where the frontiers of knowledge are expanding, it was and remains desirable for the legislature to delegate the enumeration of specific criteria to those who daily encounter the problems which gave rise to the legislation.

II

THE JUVENILE COURT RULINGS WERE CONSISTENT WITH THE GOVERNING STATUTE

A. PETITIONER WAS ACCORDED THE "FULL INVESTIGATION" REQUIRED BY 11 D.C. CODE 1553

"Full investigation" has consistently been interpreted by the courts of the District of Columbia—whose construction of statutes having only local application is entitled to great, if not controlling, weight (see *Fisher* v. *United States,* 328 U.S. 463, 476–477)—to mean only "that the judge be fully advised of relevant facts, by such means as are available to him through the various branches of the Court, so that he may intelligently exercise his discretion." *United*

States v. *Stevenson,* 170 F. Supp. 315, 318 (D.D.C.). See also *Wilhite* v. *United States,* 281 F. 2d 642, 643 (C.A. D.C.); *Kent* v. *Reid,* 316 F. 2d 331, 333, n. 6 (C.A. D.C.), *United States* v. *Anonymous,* 176 F. Supp. 325, 326 (D.D.C.); *United States* v. *Caviness,* 239 F. Supp. 545, 549 (D.D.C.). Apart from any constitutional requirement (pp. 19–28, *supra*), the language of the statute plainly contemplates that "no formal hearing is required on a waiver of jurisdiction to the District Court." *Wilhite, supra,* at 643. Indeed, as the court stated in *Stevenson, supra,* at 318:

> To construe the statute otherwise would place an undue and unnecessary burden upon the judge, would be of little or no advantage to the child whose case is under consideration, and would inure to the detriment of other youngsters by denying them adequate and timely consideration by the judge.

The investigation in this case was "full" within the meaning of the statute, and the court's decision was supported by the record before it. Congress plainly indicated that waiver would be appropriate in cases involving "offenders who present deep-seated problems [and who] must be provided with long-term institutional care" (H. Rep. No. 242, 80th Cong., 1st Sess., p. 2). The Juvenile Court in this case had before it ample information on which to base a finding that petitioner was in this category. Petitioner, who was suspected of fourteen felonies, including three rapes and four other sexual assaults (see J.A. 21–22), had been under the court's scrutiny for more than two years prior to waiver. Petitioner's counsel

and his mother conferred with the court's Social Service Director, who is responsible for the staff's recommendation to the judge on the appropriateness of retaining jurisdiction. See Note, *District of Columbia Juvenile Delinquency Proceedings: Apprehension to Disposition,* 49 Geo. L. J. 322, 341 (1960).[21] Counsel "did not press" (J.A. 37) for an opportunity to appear personally before the judge, but he did submit, for the judge's consideration, a report from a psychiatrist retained to examine petitioner at the Receiving Home for Children. The judge also had a report on petitioner's mental condition by the court's own staff.

In his motion to dismiss in the district court, petitioner alleged that the Juvenile Court's investigation was inadequate because it did not include interviews with petitioner's father (who had been separated from his mother since petitioner was two years old (Tr. 218, 622–623)) or with his school principal. It was also alleged that petitioner's mother was interviewed for only "a few minutes" and that the court did not have full psychiatric information. As the court below correctly found, however, none of these allegations raises a substantial issue as to the court's compliance with the legislative mandate of "full investigation" (J.A. 46–48; see also Tr. 17–18, hearing of February 5, 1963, before McGuire, C.J.). Although petitioner's

[21] See Handler, *The Juvenile Court and the Adversary System: Problems of Function and Form*, 1965 Wis. L. Rev. 7, in which the author concludes that an adversary presentation is more appropriate at the administrative, rather than at the judicial, stage of Juvenile Court proceedings.

counsel was given access to petitioner's entire Social Service file in the district court, he has made no showing that any significant additional data could have been adduced through further investigation. Counsel did assert in his memorandum to the Juvenile Court that adequate facilities for treating petitioner were available at D.C. General Hospital (Affidavit of Richard Arens, filed November 16, 1961). But the experienced Juvenile Court judge was doubtless aware of the hospital's resources.

The Juvenile Court was warranted in viewing the present case as beyond its limited competence. That court reasonably concluded that if petitioner was mentally competent to stand trial, the seriousness and frequency of the alleged offenses justified a district court trial—particularly since the Juvenile Court had been unsuccessful in controlling petitioner's behavior during his two-and-a-half years of probation. If on the other hand, petitioner was mentally incompetent at the time of trial or, as the jury determined, mentally irresponsible at the time of certain of the alleged offenses, only the district court could provide the necessary long-term treatment. In short, under criteria emphasized by Congress (see p. 24, *supra*) as well as those established by the leading authorities in this field,[22] the investigation in the

[22] See, *e.g.*, The National Probation and Parole Association, *Standard Juvenile Court Act* § 13, comment; *Standards for Specialized Courts Dealing with Children*, Children's Bureau Publication No. 346–1962, pp. 26–28; cf. Rubin, *Trends in Juvenile Court Philosophy*, 7 Social Work 53, 54–55 (1962); *In re Heist*, 11 Ohio Op. 537; *State* v. *LaPierre*, 39 N.J. 156.

present case brought forth sufficient information to warrant the Juvenile Court's decision that petitioner's interests and those of the public would not be served by reliance upon the limited resources of the Juvenile Court.

We agree with the court below (J.A. 43, n. 6) that it might have been useful for the Juvenile Court to have stated on the record its reasons for waiving jurisdiction in this case, but as we have shown, and as the district court and the court of appeals found, the record on its face shows ample support for the Juvenile Court's determination.

B. PETITIONER'S COUNSEL HAD NO STATUTORY RIGHT TO EXAMINE PETITIONER'S SOCIAL RECORDS

Contrary to petitioner's contention (Pet. Br. 41-42), there was no statutory requirement that he be furnished the disputed files by the Juvenile Court. The statute (then 11 D.C. Code 929, pp. 3–4, *supra*) provided that the ordinary court records "shall be open to inspection only by * * * duly authorized attorneys" (Section (a)) but that the social records, by contrast, "shall be made available * * * by * * * special order of court [only] to such persons, governmental and private agencies, and institutions as have a legitimate interest in the protection, welfare, treatment, and rehabilitation of the child * * *" (Section (b)).

The history of this provision is instructive. As we have noted (*supra*, p. 22) the original Juvenile Court Act had no provision for privacy of hearings or records. The 1938 Act, however, provided as follows (§ 28, 52 Stat. 603):

> The court shall maintain records of all cases brought before it. Such records shall be open to inspection by respondents, their parents or guardians, or their duly authorized attorneys, but otherwise only by order of the District Court of the United States for the District of Columbia * * *.

As the Act made no mention of the social records, the then judge of the Juvenile Court construed it to mean that she had no authority to divulge those records to anyone other than the staff of the court.

The record-inspection provision in its present form was enacted to correct the adverse effects of the judge's ruling as to the social records (66 Stat. 134; 98 Cong. Rec. 1305–1306, 5974–5976). The problems which Congress sought to correct were discussed in the committee reports (H. Rep. No. 1937, 82d Cong., 2d Sess., pp. 2, 4; S. Rep. No. 1195, 82d Cong., 2d Sess., pp. 2–3) as follows:

> This ruling has had the effect of withholding information from certain agencies which the agencies need to carry on their work properly. * * * It is necessary that the Board of Public Welfare and other institutions to which children may be committed have the benefit of the investigations made by the staff of the juvenile court. Otherwise such agencies are required to duplicate the work of the court, with the attendant delay, when it is to the interest of the child that such institutions have the benefit of the social history of the child at the earliest possible moment.

As the legislative history shows, Congress intended only to avoid unnecessary duplication of effort by

making the social records available to the appropriate agencies after disposition of the case by the Juvenile Court. In this case, those records were made available to the district court, which, in its discretion (see *Watkins* v. *United States*, 343 F. 2d 278 (C.A.D.C.)), turned them over to petitioner's counsel.[23] The records were, therefore, fully disclosed to counsel for whatever use he could make of them in contesting the validity of waiver before trial in the district court.[24]

III

NO REVERSIBLE ERROR WAS COMMITTED DURING PETITIONER'S TRIAL

A. THE TESTIMONY OF FINGERPRINT EXPERTS WAS PROPERLY ADMITTED

The government's proof of petitioner's connection with the offenses charged in the indictment was largely based on latent fingerprints found at the scene of each housebreaking, although one victim identified petitioner as her assailant at the trial. One of these impressions, which matched petitioner's fingerprints taken at the time of a previous arrest (Tr. 9, 92–93), led to his apprehension on the present

[23] We are informed that the district court almost invariably makes the social records available to counsel contesting a Juvenile Court waiver.

[24] Petitioner's contentions that he was improperly treated while in the jurisdiction of the Juvenile Court (Pet. Br. 30–32, 43–44) and that the district court, at a pretrial stage, disparaged his psychiatric proof (Pet. Br. 45–46) raise no substantial questions. No evidence introduced against petitioner at his trial was attributable to interrogation following his arrest. Petitioner erroneously speculates that the hypothetical

charges on September 5, 1961, at which time he was fingerprinted again. At trial, expert witnesses testified, without objection, that the impressions found at the victims' apartments matched those taken after petitioner's 1961 arrest (Tr. 91–92, 111, 206). Petitioner now challenges this testimony on the ground that reference was thereby made to confidential information in Juvenile Court records (Pet. Br. 46–49).

Petitioner not only failed to object to the challenged testimony (Tr. 87, 122, 131, 203), but he stipulated that the 1961 fingerprints might be used for purposes of comparison (Tr. 88, 198, 214). This acquiescence is particularly significant where, as here, the same testimony could have been presented by other means had a timely objection been made. Had petitioner asserted at trial the claim he makes here, government counsel could have asked the expert witnesses to compare the impressions found at the victims' apartments with other fingerprints on file, such as those which may have been routinely taken after petitioner was transferred from Juvenile Court (cf. *Napolitano* v. *United States*, 340 F. 2d 313 (C.A. 1)),

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questions posed to defense psychiatrists were based on admissions made at that time (Pet. Br. 31), but the record discloses that the victims testified to a sequence of events which supported the hypothetical facts (Tr. 33–35, 101, 139). And there is no basis in the record for assuming that the district court did not seriously consider the question whether the Juvenile Court's waiver was proper. The district court had the social records before it, it knew the nature of the charges, and it knew that petitioner had not responded to Juvenile Court treatment. These factors abundantly supported the Juvenile Court's waiver and the district court's refusal to constitute itself a Juvenile Court.

or even with fingerprints taken in open court.[35] Especially where, as here, the failure to object was apparently prompted by a strategic decision to rest solely on proof of insanity (see Tr. 24), we believe it is entirely clear that no "plain error" was committed.

In addition, petitioner's argument is unsound on its merits. Fingerprints taken by police officers upon arresting a juvenile are not records of the Juvenile Court; nor do they constitute information "acquired in the course of the performance of official duties" within the meaning of 11 D.C. Code 929(c). It is clear that the only "official duties" referred to by that section are those of the Juvenile Court—and not those of police officers who arrest a juvenile in carrying out their own official obligations. Indeed, the fact that Congress found it necessary to specify that the term "records" as used in Section 929 "includes notices filed with the court by arresting officers" (11 D.C. Code 929(a)) demonstrates that routine police photographs and fingerprints—which are not "filed with the court"—are not encompassed by the confidentiality provision.

Fingerprinting is part of the routine "booking" process which, in the case of an adult offender, the police may complete before complying with Rule 5(a), Fed. R. Crim. P. See *Mallory* v. *United States*, 354 U.S. 449, 454. There is thus no merit in the suggestion (Pet. Br. 48) that fingerprinting by police renders

[35] It has been uniformly held that fingerprinting, like the taking of a photograph, does not violate the privilege against self-incrimination. See 8 Wigmore, *Evidence*, § 2265, and authorities there cited.

brief detention of a juvenile illegal. Not only is there no support in the record for the assumption that petitioner was fingerprinted during an impermissible delay, but there is indeed no reason to believe that there was any unlawful delay whatever. See opinion of the court below, J.A. 50–51, n. 13.

B. PETITIONER WAS NOT ENTITLED TO A DIRECTED VERDICT ON THE ISSUE OF INSANITY

Petitioner's contention that the government's proof regarding his mental condition at the time of the offenses was insufficient to send the case to the jury (Pet. Br. 49–53) is refuted by the record. The conclusions to which petitioner's experts testified—*i.e.*, that the crimes were products of a mental disease from which petitioner was suffering when he committed the offenses (see Appendix B, pp. 4a–7a, *infra*)—were disputed by two psychiatrists who testified as government witnesses on rebuttal. Dr. Kavanagh concluded that petitioner had not been suffering from any mental disease, and Dr. Owens testified that petitioner did have a mental disease but that the housebreakings and robberies were not the products thereof (App. B, p. 7a, *infra*). See also testimony of Drs. Dobbs and Novak (Appendix B, *infra*, pp. 6a–7a). The court of appeals correctly held that this left the case "in the precise posture which calls for submission of the issue to the jury" (J.A. 57).

There is no merit to the challenges petitioner now makes to the conclusions of the government experts. Dr. Kavanagh's statement on cross-examination that

petitioner was not "a normal individual" (Tr. 704) related to his conclusion that petitioner suffered from a personality disorder which did not, in his view, amount to a mental disease. The other testimony quoted by petitioner (Pet. Br. 50) was to the same effect. Hence Dr. Kavanagh's conclusion that the offenses were not products of any mental disease or defect (which is the governing test in the District of Columbia) was not affected by his cross-examination. And the hypothetical questions posed to Dr. Owens were based on the victims' testimony that, in each instance, the offender committed the robbery before he attempted the rape (Tr. 33–35, 101, 139). Moreover, petitioner did not object to these hypothetical questions on this ground at trial (Tr. 331, 338, 340, 364, 367, 368, 468, 485, 489, 501, 549, 555, 649), and should not now be heard to assert that an insufficient evidentiary foundation was laid to support them. On the basis of this testimony, the jury was justified in concluding that the housebreakings and robberies were not products of any mental disease, but that the rapes were caused by petitioner's mental disorder. This verdict was most consistent with Dr. Owens' conclusions, and it was within the jury's province to accept his expert view. See *McDonald* v. *United States*, 312 F. 2d 847 (C.A.D.C.).

G. THE COURT'S INSTRUCTIONS TO THE JURY WERE NOT COERCIVE

Petitioner's final argument is that the district judge's concluding instructions to the jury improperly coerced individual jurors into agreeing upon a compromise verdict (Pet. Br. 54–56). An examination of

the challenged instructions (pp. 12–13, *supra*), we submit, discloses that they are not coercive in any respect. In the course of these remarks the judge stated on three occasions that each juror was to arrive at an individual verdict, and it was only after making that proposition entirely clear that he suggested that the issues be considered "with a proper regard and deference to the opinions of each other" and that jurors in a "pronounced minority" on any one issue ask themselves why their views were not shared by "a great number of other jurors who are equally honest and equally intelligent * * *" (Tr. 815–816). This was a proper instruction on the attitude with which individual jurors were to approach the issues in the case.

The added statement that "[i]t is your duty to decide this case if you can conscientiously do so" was not an instruction to compromise. It was clear from that statement, both in isolation and in context, that the "duty to decide" existed only if decision could be made consistently with conscientiously held individual views. Thus, this remark is wholly unlike the statement held impermissibly coercive in *Jenkins* v. *United States,* 380 U.S. 445.

Moreover, unlike the charge in *Jenkins* or that in *Allen* v. *United States,* 164 U.S. 492, the challenged remarks were not made to a deadlocked panel, but were included in the general charge before the jury first retired. This is obviously a significant difference. Jurors who find themselves in a minority after substantial deliberation might arguably be coerced to surrender individual views if an implication to that

effect in a judge's statement is added to the majority's pressures. But when the jury has not yet begun its deliberations, instructions of the sort involved here merely promote a desirable attitude of open-mindedness. Similarly, an instruction suggesting that a verdict must be reached might be coercive if given to a deadlocked jury; it is far less so if announced to a jury which is first retiring.

In any event, if petitioner thought it necessary to erase any suggestion of coercion before the jury retired, he should have asserted an objection and proposed a supplementary clarifying instruction. Instead of doing so, he approved the court's charge, possibly because he believed that its effect would be favorable to him. In light of this acquiescence, the present claim should be foreclosed. Rule 30, Fed. R. Crim. P.

No separate contention has been made by petitioner with respect to his sentence, but we believe that the matter deserves mention. Having been found not guilty of the rape charge by reason of insanity pursuant to his assertion of that defense, petitioner was subject to mandatory commitment under 24 D.C. Code 301(d). See *Lynch* v. *Overholser,* 369 U.S. 705. Petitioner's counsel stated at the sentencing proceedings that petitioner was so mentally ill that he might be required to remain in St. Elizabeths Hospital "for the rest of his life" (Tr. 826). He suggested that any sentence on the six housebreaking and robbery counts run concurrently with petitioner's hospital commit-

ment so that "maybe in 30 years, maybe in 40 years * * * when he is free in the eyes of the hospital" he would not be subject to a prison term (Tr. 827). Government counsel was not asked to recommend any sentence, and none was recommended. The district judge imposed consecutive sentences of five to fifteen years on each of the six counts on which petitioner had been found guilty (for a total sentence of thirty to ninety years) with provision that petitioner should be credited with the time spent in a mental institution.

We recognize that the sentence is a very heavy one, even in light of the information before the court tending to show that petitioner had been involved in other criminal activity besides that alleged in the indictment. The practical consequences of the lengthy sentence are not of course predictable since we do not know for how long a period petitioner will require hospitalization and treatment. If he should be able to establish that his recovery has been more rapid than anticipated and that the sentence is too drastic in light of subsequent events, he may move for reduction of sentence under Rule 35, Fed. R. Crim. P., within 60 days after a final order of affirmance. Also, petitioner is not without a remedy if he recovers his sanity several years after affirmance of his conviction. Under 24 D.C. Code 201(c), the Board of Parole for the District of Columbia may apply to the court for a reduction of the minimum sentence whenever it determines that a prisoner has been rehabilitated and his immediate release is not incompatible with the welfare of society. This power has

been used sparingly, but it is available and can appropriately be exercised in a situation such as this one.[26]

CONCLUSION

For the reasons stated, it is respectfully submitted that the judgment below should be affirmed.

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NOVEMBER 1965.

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[26] We observe also that petitioner is now over the age of twenty-one and cannot, in any event, come under the jurisdiction of the Juvenile Court. See 11 D.C. Code 1551(b) (Supp. IV, 1965). If this Court were to reverse the instant conviction for the reason that the procedures followed by the Juvenile Court in waiving jurisdiction were impermissible, it is questionable whether the case could be returned to that court for it to determine the relevant issues under proper procedures. Since he is now over twenty-one, petitioner may hereafter be tried on the charges involved in the present indictment only in the district court. The validity of the indictment entered in 1961 turns, however, on the lawfulness of the waiver. If the waiver was void, petitioner will probably have to be reindicted. A new indictment on the housbreaking and robbery charges will, presumably, have to be based upon the special provision in 18 U.S.C. 3288 permitting reindictment where the defect in the former indictment is found after the limitations period has expired.

APPENDIX A

NOVEMBER 30, 1959.

JUVENILE COURT OF THE DISTRICT OF COLUMBIA

POLICY MEMORANDUM NO. 7

To: All Staff.
From: Judge Ketcham.
Subject: Waiver of Jurisdiction.

The authority of the Judge of the Juvenile Court of the District of Columbia to waive or transfer jurisdiction to the U.S. District Court for the District of Columbia is contained in the Juvenile Court Act (§ 11–914 D.C. Code, 1951 Ed.). This section permits the Judge to waive jurisdiction "after full investigation" in the case of any child "sixteen years of age or older [who is] charged with an offense which would amount to a felony in the case of an adult, or any child charged with an offense which if committed by an adult is punishable by death or life imprisonment".

The statute sets forth no specific standards for the exercise of this important discretionary act, but leaves the formulation of such criteria to the Judge. A knowledge of the Judge's criteria is important to the child, his parents, his attorney, to the judges of the U.S. District Court for the District of Columbia, to the United States Attorney and his assistants, and to the Metropolitan Police Department, as well as to the staff of this court, especially the Juvenile Intake Section.

Therefore, the Judge has consulted with the Chief Judge and other judges of the U.S. District Court for the District of Columbia, with the United States Attorney, with representatives of the Bar, and with other groups concerned and has formulated the following criteria and principles concerning waiver of jurisdiction which are consistent with the basic aims and purpose of the Juvenile Court Act.

An offense falling within the statutory limitations (set forth above) will be waived if it has prosecutive merit and if it is heinous or of an aggravated character, or—even though less serious—if it represents a pattern of repeated offenses which indicate that the juvenile may be beyond rehabilitation under Juvenile Court procedures, or if the public needs the protection afforded by such action.

The determinative factors which will be considered by the Judge in deciding whether the Juvenile Court's jurisdiction over such offenses will be waived are the following:

1. The seriousness of the alleged offense to the community and whether the protection of the community requires waiver.

2. Whether the alleged offense was committed in an aggressive, violent, premeditated or willful manner.

3. Whether the alleged offense was against persons or against property, greater weight being given to offenses against persons especially if personal injury resulted.

4. The prosecutive merit of the complaint, i.e., whether there is evidence upon which a Grand Jury may be expected to return an indictment (to be determined by consultation with the United States Attorney).

5. The desirability of trial and disposition of the entire offense in one court when the juvenile's associates in the alleged offense are adults who will be charged with a crime in the U.S. District Court for the District of Columbia.

6. The sophistication and maturity of the juvenile as determined by consideration of his home, environmental situation, emotional attitude and pattern of living.

7. The record and previous history of the juvenile, including previous contacts with the Youth Aid Division, other law enforcement agencies, juvenile courts in other jurisdictions, prior periods of probation to this Court, or prior commitments to juvenile institutions.

8. The prospects for adequate protection of the public and the likelihood of reasonable rehabilitation of the juvenile (if he is found to have committed the alleged offense) by the use of procedures, services and facilities currently available to the Juvenile Court.

It will be the responsibility of any officer of the Court's staff assigned to make the investigation of any complaint in which waiver of jurisdiction is being considered to develop fully all available information which may bear upon the criteria and factors set forth above. Although not all such factors will be involved in an individual case, the Judge will consider the relevant factors in a specific case before reaching a conclusion to waive juvenile jurisdiction and transfer the case to the U.S. District Court for the District of Columbia for trial under the adult procedures of that Court.

APPENDIX B

Evidence on the Insanity Issue

LAY TESTIMONY

Mrs. Courtney T. Kent, mother of petitioner, testified as follows: She was separated from petitioner's father when petitioner was two years' old (Tr. 218). Petitioner was afraid of his father (Tr. 219, 227, 228). Petitioner first got in trouble when he was 13 or 14 for taking a purse (Tr. 222–223, 226). Petitioner's behavior was disturbed in that he appeared to be in a trance (Tr. 219–220), he could not control his bowels (Tr. 220), he had cut up some goldfish (Tr. 220), and he had killed his puppy (Tr. 221).

Two aunts who took care of petitioner part of the time give similar testimony as to petitioner's behavior (Tr. 603–606, 608–612). Thomas C. Cope, petitioner's uncle, testified that petitioner would talk to himself, and could not finish small odd jobs (Tr. 243).

PSYCHOLOGICAL TESTIMONY

Katherine Beardsley, a clinical psychologist at St. Elizabeths Hospital who tested petitioner, testified that the results were consistent with a diagnosis of chronic undifferentiated schizophrenia (Tr. 255)—marked by poor ability to control one's emotions and to appraise reality (Tr. 256). She testified that he had this condition in June 1961 and that "but for the mental disease [the offenses] would not have occurred" (Tr. 257).

John Lawrence Endacott, Assistant Chief clinical psychologist in the Mental Hygiene Clinic of the Veterans Administration testified that petitioner had average intellectual ability and was suffering from schizophrenia, undifferentiated type (Tr. 379), with a fifty-fifty chance that the cause was some sort of organic condition (Tr. 380). In his opinion, petitioner's acts were directly the result of his schizophrenic condition (Tr. 380).

John Vincent Kavanagh, a psychiatric social worker, testified that he examined petitioner in the spring of 1961 and found him evasive and not properly aware of his problem at school. At that time, he advised that petitioner be seen by a psychiatrist before being readmitted in the September term (Tr. 439).

Malcolm Meltzer, a clinical psychologist, testified that between June and September 1961, it was highly likely that petitioner was suffering from a mental disease—schizophrenia reaction (Tr. 446), and that it was highly likely his criminal acts were caused by the mental disease (Tr. 447).

Bernard Levy, director of psychological services for D.C. General Hospital, testified that his tests taken at the Receiving Home showed that, in June and September 1961, petitioner was suffering from schizophrenia which was the proximate cause of the alleged crimes (Tr. 563).

PSYCHIATRIC TESTIMONY

Dr. Mauris M. Platkin, a psychiatrist from St. Elizabeths Hospital, testified that petitioner was suffering from a schizophrenic reaction, chronic undifferentiated type (Tr. 300), and was suffering from this mental disease in June and September 1961 (Tr.

300–301). He attributed petitioner's acts to his mental disease (Tr. 304). On cross-examination, on the basis of a hypothetical question founded on the facts with respect to Miss Echols (*supra*, pp. 10–11), the doctor testified that he did not know whether petitioner was irresistibly impelled to enter the apartment—"It doesn't sound to me as though he were * * *" (Tr. 330–331)—but that petitioner most likely was aroused sexually when she dropped the pillow (Tr. 333–334). The doctor concluded (Tr. 345): "I agree he went in there ostensibly to get money but I think his desire to do this was the result of the fact that he has a mental illness".

Dr. William Novak, a psychiatrist at D.C. General Hospital, testified that during June and September 1961, petitioner was suffering from a mental disease—schizophrenia reaction of the undifferentiated type (Tr. 350)—and that the acts charged were products of his mental state (Tr. 352). Although he was unable to arrive at a definite opinion, it seemed to him that petitioner was psychotic at that time (Tr. 358). On the basis of a hypothetical question derived from the Echols incident, the doctor admitted that the activity might indicate design and thoughtful planning to rob (Tr. 364).

Dr. Dorothy S. Dobbs, a staff psychiatrist at St. Elizabeths Hospital, testified that from June through September 1961, petitioner was suffering from schizophrenia reaction, chronic undifferentiated, which is a mental disease (Tr. 474). In her opinion the crimes were a product of this mental disease (Tr. 476), although she thought it difficult to answer whether "but for" the disease, petitioner would have committed these crimes (Tr. 476). She admitted that if the facts showed that the robbery was committed first, she would have no honest opinion as to his prime motive

(Tr. 487). It might show prior planning, and it would also show some appreciation of the fact that the act was wrong (Tr. 487–488). She concluded that "the causation with regard to the robberies is obviously less clear than it is with regard to the alleged sexual offenses themselves" (Tr. 492).

Dr. Warren Charles Johnson, a private psychiatrist, testified that during the period June through September 1961, petitioner was suffering from schizophrenia (Tr. 521), and that the acts charged were products of his mental disease (Tr. 528). Dr. Charles E. Goshen, Associate Professor in the Department of Psychiatry at West Virginia University testified similarly (Tr. 635–642). It was stipulated that Drs. William Hamman and James A. Ryan, psychiatrists, would testify that petitioner was suffering from schizophrenia, undifferentiated type, and that the alleged acts were a direct product of this mental disease (Tr. 600–602).

Dr. David J. Owens, psychiatrist at St. Elizabeths Hospital and the Clinical Director of the Maximum Security Unit, also testified that petitioner was suffering from schizophrenic reaction, chronic undifferentiated type (Tr. 672–673). His view, in the context of a hypothetical question based on the Echols facts, was that the disease did not cause the robbery or housebreaking (Tr. 674). He had no opinion as to whether it caused petitioner to rape the victim (Tr. 674). He gave similar answers to hypothetical questions covering the Palmer and Murphy situations (Tr. 675–676).

Dr. John Richard Kavanagh, a psychiatrist, testified that petitioner did not have any mental disease (Tr. 690) but that he would withdraw to avoid answering questions (Tr. 692). The doctor thought that petitioner's actions, which he had observed, were not indicative of an unsound mind or one who is psychotic (Tr. 692–702).

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